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SUPREME COURT OF THE UNITED STATES

_____ Term, 1976

No. 75-1772

AGNEL JONES, *Petitioner*

- v -

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered therein on the 30th day of March, 1976.

Petition for Rehearing was denied on the 7th day of May, 1976.

OPINION BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is as yet unreported, but appears in the

appendix hereto. This opinion affirmed judgment of conviction of petitioner upon one count for possession of a firearm as a convicted felon in violation of 18 U.S.C. App. §1202(a), and reversing a judgment of conviction of petitioner upon two other counts for the same offense.

Petitioner was tried by jury in the Pikeville Division of the United States District Court for the Eastern District of Kentucky, and given a sentence of two years' imprisonment and a Ten Thousand ($10,000.00) Dollar fine for each of three counts upon which he was convicted.

JURISDICTION

The judgment of the United States Court of appeals for the Sixth Circuit was entered on March 30, 1976, in *United States* v. *Agnel Jones*, No. 75-1817. Petition for Rehearing was denied on May 7, 1976.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). This petition is timely filed.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in not considering the merits of petitioner's arguments regarding the validity of the seizures of information from the firearm.

II. Whether the Court of Appeals erred in stating that in an 18 U.S.C. App. §1202(a)(1) offense the nexus between interstate commerce and possession of a firearm is equal to that between interstate commerce and receipt of a firearm.

III. Whether the Court of Appeals erred in failing to hold that the refusal of the District Court to submit to the jury an instruction, proffered by petitioner, defining the nexus between interstate commerce and possession was substantial and prejudicial error.

IV. Whether the Court of Appeals erred by failing to hold that the District Court committed an impropriety in denying the petitioner's motion for bail during the pendency of an appeal from initial sentencing under 18 U.S.C. §4208(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article One, Section Eight, Clause Three

The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

AMENDMENT IV — SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VIII — EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. §3148. Release in capital cases or after conviction

A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: *Provided*, That other rights to judicial review of

conditions of release or orders of detention shall not be affected.

18 U.S.C. §4208(b)

If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

18 U.S.C. App. §1202. Receipt, possession, or transportation of firearms — Persons liable; penalties for violations

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . .

(5) being an alien is illegally or unlawfully in the United States and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

On March 12, 1974, petitioner Agnel Jones was indicted by a Grand Jury from the Eastern District of Kentucky, of a violation of 18 U. S. C. Appendix §1202(a)(1). Mr. Jones was arraigned before Judge H. David Hermansdorfer on May 13, 1974, at which time he pleaded not guilty to the charges against him.

The defendant filed a motion to suppress certain evidence and a motion to dismiss the indictment against him on June 13, 1974. The motion to suppress was continued for evidentiary hearing and the motion to dismiss was overruled without prejudice. The evidentiary hearing on the motion to suppress was held on July 17, 1974. The motion was overruled.

A new indictment, returned by a Grand Jury of the Lexington Division of the United States District

Court for the Eastern District of Kentucky, was entered on October 1, 1974. This five-count indictment superseded the original March 12, 1974 indictment. On May 19, 1975, the original indictment was dismissed.

On November 5, 1974, petitioner moved to dismiss the first four of the five counts constituting the later indictment. Also, petitioner moved to suppress certain evidence on November 5. The motion to dismiss was overruled on January 13, 1975, and the motion to suppress was passed to the merits. On February 27, 1975, the motion to suppress was, after evidentiary hearing thereon, overruled.

A jury for trial of the case was impaneled at Pikeville, Kentucky, on March 10, 1975. Trial commenced on March 12, 1975 and concluded on March 13, 1975. The verdict was guilty on Counts 1, 3 and 5 of the indictment and not guilty on Counts 2 and 4. On March 17, 1975, petitioner moved for a judgment of acquittal notwithstanding the verdict and, alternatively, for a new trial. Both motions were overruled on March 20, 1975.

Petitioner was temporarily sentenced on April 7, 1975 to two years in prison and a $10,000.00 fine for each of the three counts of which he was found guilty. Final sentencing was delayed pending the results of Mr. Jones' commitment to the Medical

Center for Federal Prisoners at Springfield, Missouri. The purpose of this commitment was to obtain a physical examination and report concerning petitioner's fitness to withstand incarceration without ill effect. Also on April 7, petitioner applied to the District Court for bail, and was denied the same.

On April 8, 1975, an appeal to the United States Court of Appeals for the Sixth Circuit was filed by petitioner. This was followed on April 15 with a motion for bail also addressed to the Sixth Circuit Court of Appeals. The motion for bail was denied on June 12, 1975.

Petitioner was returned to the District Court from the Medical Center at Springfield, and final sentence was pronounced on July 17, 1975. Mr. Jones was sentenced to two years in prison on each of the three convictions, the last two sentences to run concurrently. All three prison sentences were probated for five years. Petitioner was also sentenced to pay $10,000.00 fine for each conviction, plus costs. The last two fines were probated for five years. On July 25, 1975, an appeal to the Sixth Circuit Court of Appeals was duly perfected from final sentencing.

On March 30, 1976, the Sixth Circuit Court of Appeals reversed the convictions upon counts 3 and 5 on the ground that possession was a continuing offense, and thus these counts subjected petitioner

to double jeopardy. The conviction and sentence upon count 1 was affirmed.

Jurisdiction of the District Court was under 18 U.S.C. §3231.

STATEMENT OF FACTS

On March 28, 1973, on a rural road near Estill, in Floyd County, Kentucky, petitioner, while operating his automobile, was stopped in a routine traffic check by two Kentucky State Troopers. Both troopers were wearing uniforms, armed and operating a marked state police vehicle. Petitioner was not stopped for any traffic violation; any vehicular malfunction; any vehicular license violation; as a result of any belief that he had been involved in any crime or had even been convicted of a felony; or for any other reason than the fact that he was a random subject of an operator's license check.

Mr. Jones was asked to present his operator's license, which he did, and said license was found to be correct. At the time he was asked for his license, one of the troopers noticed that lying on the seat beside the defendant was a pistol. The officer then asked the petitioner to hand him the gun, which he did. Upon receiving the gun, the officer noted all the pertinent data concerning said gun — that being the description, model number, serial number, and

manufacturer. One of the officers called in the information seized from the revolver to both the Hazard and Pikeville State Police Posts and asked if there were any information showing petitioner to be a convicted felon. The reply from both Posts was negative. Petitioner was then handed the gun and allowed to drive away.

From the information so seized, the Government over a year later brought Count Three (3) of the indictment against petitioner.

On December 18, 1973, Agents of the Alcohol, Tobacco, and Firearms Division of the United States Treasury Department sought and a United States Magistrate issued a search warrant directing officers to search for "distilled spirits and other alcoholic beverages being used by petitioner in violation of Sections 5121(a), 5691(2), Chapter 51, Title 26 of the Internal Revenue Code." During the search, carried out on December 21, 1973, petitioner produced evidence proving that he was not in violation of the aforementioned laws. Therefore, the officers released him from their custody.

During the above search, and after petitioner had shown the officers the aforementioned evidence, the agents observed a revolver, which they examined and from which was seized pertinent data including description, model number, serial number and manufacturer. The officers were informed that the

weapon belonged to petitioner's wife. Petitioner was not at that time arrested for any firearm violation, although the ATF Agents later claimed that they knew him to be a convicted felon. Several weeks later, however, another warrant was issued for the arrest of petitioner, this time alleging a violation of 18 U.S.C. Appx. §1202(a)(1). The complaint for the warrant alleged that petitioner illegally "possessed a firearm, a Burgo, .32 S.&W. long, 7 shot revolver, 3 in. barrel, model HW3, nickel finish, serial number 304946." This was the same gun viewed by the agents in the December, 1973, search of the defendant's home.

Several months later, an indictment was brought against petitioner listing the two above described occasions as being events upon which the defendant was in possession of a firearm in violation of the Gun Control Act. Jones has a prior felony conviction which was known to Special Agent Beam on December 21, 1973, and is now charged in Count Five (5) of the indictment of this case with a violation of Title 18 U.S.C. Appx. §1202(a)(1) in connection with the possession of the .32 caliber Burgo revolver on that date.

Count One (1) of the indictment presumably refers to the October, 1970 occasion on which it has been testified that the Burgo pistol petitioner stands accused of possessing was sold to him. The evidence

of the sale and petitioner's subsequent possession was obtained by investigation inaugurated because of the March and December, 1973, searches.

REASONS FOR GRANTING THE WRIT

The first question in this case involves the right of an individual to be free from unreasonable searches and seizures where the evidence obtained from such a seizure is used to initiate an investigation disclosing other evidence of possible criminal activity.

The second question relates to the fact that this Court needs to make a definitive statement regarding the nexus of interstate commerce to both possession and receipt and thus to achieve uniformity in enforcement of 18 U.S.C. App. §1202(a)(1).

The third question raises the issue of whether the burden of proving a nexus between the alleged activity and interstate commerce, an indispensable ingredient of the offense of violating 18 U.S.C. App. §1202(a)(1) is satisfied in a manner twice declared unconstitutional, that is, by presumption that proof of possession means proof of interstate commerce.

The fourth question is whether an individual's statutory right to be free on bail pending appeal, founded upon the Eighth Amendment's proscription against excessive bail, can be negated by

misapplication of the temporary sentencing technique under 18 U.S.C. §4208(b).

I. THE COURT OF APPEALS ERRED IN NOT CONSIDERING THE MERITS OF PETITIONER'S ARGUMENTS REGARDING THE VALIDITY OF THE SEIZURES OF INFORMATION FROM THE FIREARM.

The March, 1973, search was not one under the authority of a warrant. The only exception to the Fourth Amendment requirement of a warrant which might possibly have permitted Trooper Williamson to seize the informational data from the pistol is delineated in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971). The *Coolidge* test, *supra,* at p. 466, has three elements, all of which must exist in order to establish probable cause sufficient for an officer to make a warrantless search. These elements are:

(1) the law enforcement officers must have a prior justification for being present;

(2) the search or seizure must result from an inadvertent observation by the offficers; and

(3) it must be immediately apparent that evidence incriminating the accused has been discovered.

All of these elements are indispensable.

The third element was lacking during the March, 1973, search. The existence of a pistol on the front seat of a car is per se an innocent factor,

which only becomes incriminating if the operator of the vehicle is a felon.

In order for that incrimination to be immediately apparent to the law enforcement officer, he must know or have reasonable belief that the operator is a felon. Trooper Williamson did not. At best, he had only a naked belief or suspicion. This Court has consistently held that a naked belief or suspicion does not constitute probable cause. *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Nathanson* v. *United States*, 290 U.S 41 (1933); *Henry* v. *United States*, 361 U.S. 98 (1959). Hence, the third element required by *Coolidge*, *supra*, was not met, there was no probable cause, and this seizure was illegal.

At the December, 1973, seizure, the law enforcement officers initially intruded under the aegis of a then-valid warrant. And, upon the instant they saw the firearm in the petitioner's hand, they were immediately and reasonably aware that a felony was being committed. However, the warrant had been invalidated by clear and precise evidence destroying the probable cause therefor.

Furthermore, the second element in *Coolidge*, *supra*, was lacking. The officers did not discover the pistol inadvertently. To the contrary one of them specifically requested petitioner to point out such an item of evidence if it were present.

Nor did the officers have a reasonable fear for their own safety or that of others. The warrant had

been executed and invalidated. They had searched petitioner. Petitioner had not acted in a hostile manner. Nor would he, knowing the warrant to be void on its face at the time the officers asked for the gun.

Therefore this seizure also was not under a warrant, not within any exception thereto, and, hence, illegal.

The information obtained as a result of these two seizures gave rise to the investigation which resulted in the evidentiary basis of count 1 of the indictment. Without that information (manufacturer, caliber, and serial number), the officers could not have traced the firearm into petitioner's hands.

Under the rule of law called the "Fruits of the Poison Tree Doctrine," *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385 (1920), the evidence obtained thereby was as tainted as that obtained directly by the seizures and must be rejected. With the rejection of that evidence, count 1 is unsupported by admissible evidence. As a result, the Court of Appeals erred in failing to reverse the conviction on Count 1 on the grounds that the seizures were illegal.

II. THE COURT OF APPEALS ERRED IN STATING THAT IN AN 18 U.S.C. APP. §1202(a)(1) OFFENSE THE NEXUS BETWEEN INTERSTATE COMMERCE AND POSSESSION OF A FIREARM IS EQUAL TO THAT BETWEEN INTERSTATE COMMERCE AND RECEIPT OF A FIREARM.

Although 18 U.S.C. App. §1202(a)(1) also makes illegal receipt and/or transportation of a firearm as a convicted felon, the indictment against petitioner only charged him with five counts of possession of a firearm as a convicted felon. The constitutional basis for that statute is Article One, Section Eight, Clause Three, which gives Congress power to control interstate commerce. Thus, in order for a violation of that statute to occur, whether of receipt, possession, or transportation, there must be a nexus between the act charged and interstate commerce. *United States* v. *Bass*, 404 U.S. 336 (1971).

In *Bass, supra*, this Court further distinguished the nexus required between interstate commerce and possession and that between interstate commerce and receipt:

> Having concluded that the commerce requirement in §1202(a) must be read as part of the "possesses" and "receives" offenses, we add a final word about the nexus with interstate commerce that must be shown in individual cases. The Government can obviously meet its burden in variety of ways. We note only some

> of these. For example, a person "possesses . . . . . in commerce or affecting commerce" if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. Significantly broader in reach, however, is the offense of "receiv(ing) . . . . . in commerce or affecting commerce;" for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce.[18]
>
> [18]This reading preserves a significant difference between the "receipt" offenses under Title IV and Title VII. See supra, at 342-343, 30 L Ed 2d at 493-494.

The Court of Appeals for the Sixth Circuit originally accepted this distinction, albeit not enthusiastically. *United States* v. *McCreary*, 455 F.2d 647 (6th Cir. 1972) In later cases in which the question at bar was not presented, e.g., *United States* v. *Day*, 476 F.2d 562 (6th Cir. 1973), and *United States* v. *Brown*, 472 F.2d 1181 (6th Cir. 1973), that Court ignored the above-quoted passage in *Bass*. In those latter cases, however, the Court could afford to do so because the offenses charged both receipt and possession.

In *McCreary*, supra, the offense charged possession only. There the Court said, "We have difficulty . . . . in comprehending how it is possible for a person to possess something that he did not

receive." In spite of that the court accepted the decision in *Bass, supra*. Other Courts of Appeals have also accepted the distinction made by *Bass, supra*. See e.g. *United States* v. *Marihart*, 492 F.2d 897 (8th Cir. 1974); *United States* v. *Cassity*, 509 F.2d 1405 (9th Cir. 1975).

In the instant case, the Sixth Circuit violated the rule laid down in *Bass, supra*, on the ground that a person can not possess what he does not receive. That, of course, is not the crux of the *Bass* rationale. Rather, it was that receipt is active behavior, whereas possession is basically passive. In addition, the receipt may be legal if it occurred prior to the felony conviction, whereas the possession may continue until after the conviction and become an offense only at that time. Thus an indictment may be able to charge possession while not being able to charge receipt. Even if the receipt is illegal, the Government must allege that fact in order to obtain a conviction thereon. It is impermissible to attempt to convict a man of one offense (receipt) by simply stating that it is proved by proving another offense (possession). *Ex parte Bain*, 121 U.S. 1 (1887); *Stirone* v. *United States*, 361 U.S. 212 (1960). Hence, "the course of conduct while Congress intended to punish" is *not* the same regardless of whether the facts charged or proven show a receipt or a possession.

The Court of Appeals attempted to negate *Bass, supra*, and *Tot* v. *United States*, 319 U.S. 463

(1943), by asserting that *Barrett* v. *United States*, ____ U.S. ____ (No. 74-5566 decided January 13, 1976, 44 U.S.L.W. 4050). This Court should clearly and firmly determine that any such attempt is futile. In *Tot, supra*, this Court held unconstitutional a statutory presumption that mere possession of a firearm demonstrated its nexus with interstate commerce, in *Barrett, supra*, there was no such statutory presumption.

Bass, supra, also was neither overruled or made inapplicable by *Barrett, supra*. As pointed out in both cases, there is a distinction to be made between Title IV offenses and Title VII offenses. *Barrett* laid down the rule on Title IV offenses, as it dealt with 18 U.S.C. §922(b). *Barrett* further noted that *Bass* established the rule in Title VII cases, specifically 18 U.S.C. App. §1202(a).

The legislative presumption that mere possession is equivalent to receipt in interstate commerce was held unconstitutional in *Tot, supra*. The judicial presumption that mere possession is equivalent to either possession or receipt in interstate commerce in violation of 18 U.S.C. App. §1202(a) was declared a nullity in *Bass, supra*. *Barrett, supra*, dealt with a statute which, in the first place, did not create an offense of possession, and which, in the second place, was deliberately excluded from the holding in *Bass*. Thus the Court of Appeals adopted the wrong

standard in this case; and it should be required to accept the standard illuminated in *Bass*, supra.

III. THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE REFUSAL OF THE DISTRICT COURT TO SUBMIT TO THE JURY AN INSTRUCTION, PROFFERED BY PETITIONER, DEFINING THE NEXUS BETWEEN INTERSTATE COMMERCE AND POSSESSION WAS SUBSTANTIAL AND PREJUDICIAL ERROR.

At the conclusion of the trial, petitioner offered, for the elucidation of the jury, the following instruction defining the element of possession in commerce of affecting commerce as it applied to an 18 U.S.C. App. §1202(a)(1) indictment:

> In determining whether defendant('s/s') possession of a firearm was in or affecting commerce, you are to consider only what effect, if any, the defendant('s/s') possession of the firearms at the time and place as alleged in the indictment had on interstate commerce, or if it had a demonstrated connection or link with interstate commerce.
>
> If you do not find beyond a reasonable doubt that the possession of (a) firearm(s) by the defendant(s) at the time and place as alleged in the indictment affected interstate commerce or that said possession had a demonstrated connection or link with interstate commerce, then the plaintiff has failed to meet its burden of proof on this issue.
>
> *Marihart, supra.*

The District Court rejected this instruction because it felt bound by *Day, supra.* However, as noted previously, *Day* is not controlling. The instruction offered accords well with the cases which are controlling, namely, *Bass, supra,* and *McCreary, supra.*

Further, the instruction aids the jury by clarifying the distinction between mere possession and possession in interstate commerce. The instruction actually given comports to direct the jury to find an essential element, namely, the effect of the possession on interstate commerce. So, even if this Court should determine that *Bass* does not require a distinction between possession and receipt in regard to the nexus with interstate commerce, the instruction actually given was substantial and prejudicial error.

After all, *Tot, supra,* was not overruled, as pointed out above. It held unconstitutional the statutory presumption that possession is equivalent to a nexus with interstate commerce. And *Bass,* whether it makes the above distinction or not, held unconstitutional the court-made presumption that possession is equivalent to a nexus with interstate commerce.

As there is no presumption allowable such as the one which the District Court required the jury in this case to make, and as the Court of Appeals

sustained the District Court on this matter, the Court of Appeals was in serious error and should be reversed.

IV. THE COURT OF APPEALS ERRED BY FAILING TO HOLD THAT THE DISTRICT COURT COMMITTED AN IMPROPRIETY IN DENYING THE PETITIONER'S MOTION FOR BAIL DURING THE PENDENCY OF AN APEAL FROM INITIAL SENTENCING UNDER 18 U.S.C. §4208(b).

The defendant, after being sentenced in the District Court pursuant to 18 U.S.C. §4208(b), appealed and sought release on bail during the pendency of that appeal. Both the District Court and the Court of Appeals denied his application.

Federal Rule of Criminal Procedure 46(c) says that eligibility for release pending appeal shall be in accordance with 18 U.S.C.S. §3148. §§3148, 3146, and 3147 of 18 U.S.C.S. are some of the provisions of the Bail Reform Act of 1966. These sections disclose and mandate that a person "shall" be entitled to bail pending appeal, if such appeal is not frivolous or taken for delay, or unless the court or judge has reason to believe that no conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. Rule 46(c) also says that the burden of establishing that he will not flee or pose a danger to any other person or the community rests with the defendant.

That the appeal was not frivolous or taken for delay was amply demonstrated by the fact that petitioner obtained reversal of two of the three counts upon which he was convicted.

Petitioner offered a multitude of affidavits from, and signatures on a petition by, his neighbors calling for his release; he was further willing to give his affidavit that he would not pose a danger to anyone. This should have been sufficient to meet his burden of establishing that he would not pose a danger to the community or to any other person. Compare *United States* v. *Blyther,* 407 F.2d 1279 (D.C. App. 1969), cert. den. 394 U.S. 953; see also *Harris* v. *United States,* 404 U.S. 1232 (1971).

Harris, supra, said that, although there is no automatic right to bail pending appeal after conviction, the Eighth Amendment to the Constitution of the United States prohibiting the requirement of excessive bail obligates judges passing on the right to bail to deny such relief only for the strongest reasons. Petitioner argues that he was wrongfully denied release on bail because no such "strongest reasons", as required by *Harris, supra,* to deny bail, existed.

Indeed, the trial judge did not deny bail because of any suspicion that petitioners would pose a danger to any other person or to the community. Rather, he was of the opinion that he could properly

deny bail and instead commit petitioner to the Medical Center for Federal Prisoners *solely* because the initial sentencing was only temporary under 18 U.S.C. §4208(b).

However, this Court rejected such an argument when it stated, in *Corey* v. *United States*, 375 U.S. 169 (1963):

> It would obviously contravene the basic policies of the criminal appellate rules to require a defendant sentenced under § 4208(b) to defer his appeal until after he had submitted to the three or six months of incarceration and diagnostic study prescribed by the statute. Such a requirement would not only forestall any opportunity of a prompt appeal from an underlying criminal conviction, but would deprive a convicted defendant of the substantial right to be enlarged on bail while his appeal was pending. Indeed, the imposition of such a mandatory three- or six-month term of imprisonment before the defendant could file an appeal might raise constitutional problems of significant proportions. *Corey, supra* at p. 233.

For that reason, among others, a §4208(b) judgment was there held sufficiently final for purposes of appeal, and of bail upon appeal.

Since petitioner was not among that limited class of persons to whom bail could have properly been denied under the Eighth Amendment, Rule

46(b), and the Bail Reform Act of 1966, and since *Corey, supra*, establishes that enlargment on bail is proper following an appeal from a §4208(b) sentence, it follows that he was wrongfully committed to the Medical Center for Federal Prisoners during the pendency of his appeal.

The Court of Appeals, in its opinion on this issue on March 30, 1976, stated that under the circumstances of the case, it could not ignore the "mootness" of this question. There are two reasons why this Court should reverse that opinion. The first reason is, hopefully, limited to the facts of this case. It is, namely, that the actions of the Court of Appeals itself, in contravention of *Corey, supra*, denied petitioner bail pending appeal from the §4208(b) sentence. Thus, it was the Court of Appeals which caused the question to become moot.

The second reason is laid down in *Sibron* v. *United States*, 392 U.S. 40 (1968). There this Court held:

> a State may not effectively deny a convict access to its appellate courts until he has been released and then argue that his case has been mooted by his failure to do what it alone prevented him from doing.[13] *Sibron, supra*, at p. 53.

Surely, if a State is denied the power to do so the federal Courts of Appeals should not be permitted to

power to foreclose a man's freedom on bail and then declare his protests against such behavior as moot. Especially is this true where, in doing so, the Court of Appeals renders nugatory a right constitutionally guaranteed by Congress and by the Supreme Court of the United States.

CONCLUSION

For these reasons we respectfully urge the Court to grant a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit and to rectify the grievous errors committed by that Court.

Respectfully submitted,

DAN JACK COMBS
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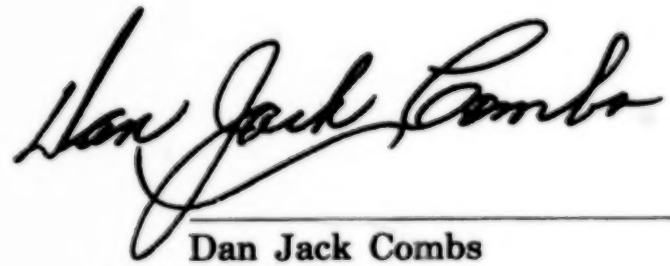
Pikeville, Kentucky 41501

Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to U. S. Sup. Ct. Rule 33(3), I hereby certify that three copies of the foregoing Petition for Writ of Certiorari was mailed to the Solicitor General, Department of Justice, Washington, D. C. 20530, and to the Honorable Eldon Webb, United States Attorney, P. O. Box 1490, Lexington, Kentucky 40501, Attorney for Respondents, this the 3 day of June, 1976.



Dan Jack Combs

APPENDIX

No. 75-1817

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, ... *Plaintiff-Appellee,*

VS.

AGNEL JONES, ... *Defendant-Appellant.*

APPEAL from United States District Court
for the Eastern District of Kentucky.

Decided and Filed March 30, 1976

Before PHILLIPS, Chief Judge, WEICK and ENGEL, Circuit Judges.

WEICK, Circuit Judge. Appellant Agnel Jones was tried in the District Court and convicted by a jury upon three counts of a five-count indictment charging him with possession of a firearm as a convicted felon, in violation of 18 U.S.C. App. § 1202 (a). He was sentenced to the maximum punishment of two years' imprisonment and a $10,000 fine on each count; however, the prison

sentences and two of the fines were suspended, and a five-year period of probation was imposed. In this appeal he challenges his convictions, his sentences, and the denial of bail pending appeal.

We shall discuss the factual setting for each assignment of error in ruling upon that assignment.

I
PROPRIETY OF MULTIPLE CONVICTIONS FOR SINGLE CONTINUOUS POSSESSION OF THE SAME FIREARM

In 1953 Agnel Jones was convicted of a felony, namely, for violation of federal income tax laws. He has a reputation of being a bootleger, and over the years has been convicted thirty-seven times in the state court for possession of alcoholic beverages for resale in local option territory, a state law crime for which he paid a fine of $100 on each conviction.

On October 15, 1970 Jones purchased a .32 caliber Burgo seven-shot revolver from a friend who needed money at the time. In March 1973 Jones was stopped by police officers who were conducting a driver's license check; the officers saw this same revolver lying on the seat beside Jones, inspected the gun and recorded its serial number. In December 1973 police officers executed a search warrant looking for untaxed liquor in Jones' store. During the search they asked Jones where his gun was, and

he told them it was on a shelf behind the counter; they inspected the gun and recorded its serial number.

In March 1974 Jones was charged in a one-count indictment with possession of a firearm in violation of § 1202 (a). In October 1974 a superseding five-count indictment was returned charging him with possession of a firearm on five separate occasions. Counts 1, 3 and 5 charged him with possession of the Burgo revolver on the three occasions described above. He was convicted on those counts and was acquitted on counts 2 and 4.

Jones contends that the multiple convictions violate the double jeopardy clause of the Fifth Amendment, and that he committed only one offense because of his continuous and uninterrupted possession of the same weapon. We agree that only one offense was committed.[1]

The fact that Jones now faces only one fine and only one probationary term does not render the multiple convictions harmless error. Violation of the

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1. We recognize that the question whether multiple punishments for the same offense violate the double jeopardy clause of the Fifth Amendment has never been resolved satisfactorily. *See United States* v. *Noble*, 155 F.2d 315, 318 (3d Cir. 1946). Some courts hold that double punishment for the same offense is illegal merely because it is not statutorily authorized, *e.g.*, *Holiday* v. *Johnston*, 313 U.S. 342, 349-50 (1941). Other courts find a constitutional infirmity, *e.g.*, *United States* v. *Benz*, 282 U.S. 304, 307 (1931).

conditions of his probation would render him liable for cumulative punishments for the several convictions. The policy of avoiding multiplicitous court proceedings dictates disposing of this issue on appeal from the convictions, rather than entertaining this question in an appeal from a motion to vacate sentence which would follow a violation of conditions of probation.

We therefore exercise our discretion under *Benton* v. *Maryland*, 395 U.S. 784, 791 (1969), believing that adverse collateral consequences could flow from the application of the concurrent sentence rule here, as recognized in *United States* v. *Febre*, 425 F.2d 107, 113 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970).

The question whether a continuing offense exists is a question of statutory construction, since Congress has the power to punish different aspects of the same crime. In *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224 (1952), the Court directed its inquiry to discovering whether Congress intended to punish a particular act or a course of conduct. In examining the statute prohibiting minimum wage law violations, the Court determined that Congress intended to punish a course of conduct consisting of paying employees less than the minimum wage, rather than to punish each act of paying an employee less than the minimum wage.

While we found no federal authority either for the proposition that possession of a contraband item is a continuing ofense, or for the proposition that possession of a contraband item at different times and places can constitute separate offenses, we find the reasoning in *In re Snow*, 120 U.S. 274, 281 (1887), to be persuasive in determining whether a continuing offense existed in the present case.

In *Snow* the defendant had followed Mormon custom in sharing marital felicity with seven wives. A federal statute prohibited cohabitation of a man with more than one woman in federal territories, including Utah, where he lived. He was charged in a three-count indictment with illegal cohabitation; each count covered a different period of time. The first count charged continuous cohabitation during 1883; the second count charged the same during 1884; and the third count charged the same for the first eleven months of 1885. The Court held that illegal cohabitation is an inherently continuing offense, and that the government could not arbitrarily divide the offense into separate time periods and multiply the penalty.

It is true that in the case at bar the Government is claiming that Jones possessed the pistol on three separate occasions, not that continuous possession existed which has been broken down into arbitrary time period. With equal propriety the Government might have charged Jones

with possession on more than 1100 separate days and obtained convictions to imprison Jones for the rest of his life. The fact that the Government merely has proof that he possessed the same weapon on three separate occasions, rather than continuously for a three-year period, should not dictate the result that Jones could receive three times the punishment he would face if continuous possession for a three-year period were proved. There is no proof that there was any interruption in the possession by Jones of the weapon.

The English case of *Crepps* v. *Durden*, Cowper 640 (K.B. 1777), discussed in *Snow*, illustrates the principle that acts constituting a course of conduct are not punishable separately if the Legislature intends to punish the course of conduct. There a baker made and sold loaves of bread on the Sabbath in violation of a statute prohibiting the practice of one's trade on the Lord's day. He suffered four convictions, but Lord Mansfield's opinion set aside three of them, holding that regardless of how many loaves he baked or how many hours he worked, only one offense could occur on any given Sunday.

Possession is a course of conduct, not an act; by prohibiting possession Congress intended to punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest in a firearm. If Congress had wished to punish each act of dominion it could have done so easily by

forbidding the acts of dominion instead of the course of conduct. In fact, Congress did declare the possessory acts of receiving and transporting firearms to be illegal, but Jones was not charged with performing such acts.

In the recent case of *United States* v. *Hairrell*, 521 F.2d 1264 (6th Cir. 1975), the defendant had been charged with possession of countefeit bills but the jury acquitted him. He was later charged with possessing the same counterfeit bills after his acquittal. He was convicted and claimed double jeopardy on appeal. This Court held that "continued possession after acquittal constituted a new and different offense from that with which he was previously charged." *Id.* at 1266.

The return of an indictment charging a course of conduct prevents the relitigation of any course of conduct charged in the indictment which is tried or dismissed with prejudice and which occurred prior to the return of the indictment. However, it does not cut off the ability of the Government to charge a course of conduct subsequent to the indictment which also establishes possession of the same contraband. Thus when this Court then stated, "Defendant was convicted of possessing counterfeit currency at a different time and place in the present case from the time and place involved in the earlier charge," the factor which made the different time and place significant was the intervening indictment and

adjudication.[2] *Hairrell* is thus consistent with *Snow*, which stated, "There was but a single offence [sic] committed prior to the time the indictments were found." 120 U.S. at 282.

The Government claims that this Court should apply the "same facts" test of double jeopardy, and that since the different counts require proof of possession at different times and places the offenses are separate. The correct statement of the same facts test is found in *Blockburger* v. *United States*, 284 U.S. 299 (1932), which held that an offense can be punished separately under two statutes if one statute requires proof of a fact which the other does not. This rule was applied to a case, like the case at bar, where a defendant was convicted under two counts of violating the same statute, in *United States* v. *Noble*, 155 F.2d 315, 318 (3d Cir. 1946). There the court said:

> To determine whether the offenses are the same the test is whether each count requires proof of a fact which the others do not.

We find that test inappropriate for an offense involving a course of conduct.

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2. *United States* v. *Nickerson*, 211 F.2d 909, 911 (7th Cir. 1954), cited by the Government as holding that possession of illegal liquor one day apart in different states constitutes two offenses, did not so hold. The court there declined to rule on that question because the defendant was serving concurrent sentences and was not prejudiced.

In *Rayborn* v. *United States*, 234 F.2d 368 (6th Cir. 1956), this Court held that simultaneous transportation of two machine guns by a fugitive could constitute only one offense.

In *United States* v. *Kinsley*, 518 F.2d 665 (8th Cir. 1975), the court held that under the statute at issue here possession of four firearms constituted a single offense. If the Government's rule were applied the result in those cases could not be reached, since each count would include a different fact, namely, a different weapon.

A course of conduct involves a number of acts. To hold that proof of a different act under a separate count establishes a separate offense would destroy the principle that a course of conduct is punishable as only one offense.

Finally, we note that when an Act of Congress is ambiguous as to the allowable unit of prosecution, doubts are resolved in favor of lenity for the accused. *Bell* v. *United States*, 349 U.S. 81, 83 (1955).

We therefore conclude that Jones can be convicted upon only one count of possession.

II

VALIDITY OF THE SEARCHES AND SEIZURES

Jones claims that the recording of the serial number of the revolver, both at the driver's license

check and during the search of his store, was illegal and violated the Fourth Amendment. This issue affects only counts 3 and 5 of the indictment. Because we have found that Jones can be convicted upon only one count of this indictment, and because the validity of the conviction upon count 1 of the indictment remains unaffected by the challenge raised here to the searches, we need not decide the question raised as to the searches and seizures.

III

NEXUS WITH INTERSTATE COMMERCE

Congress used its power under the Commerce Clause of the Constitution to enact the statute under which Jones was convicted. Thus the statute prohibits possession, receipt, or transportation of a firearm by a felon "in or affecting commerce."

Jones contends that his purchase of the revolver in Kentucky was an intrastate transaction and that there was no showing that his possession of the weapon affected interstate commerce. The evidence at the trial on this element of the crime consisted of testimony that the weapon had been manufactured in West Germany in 1968. It necessarily follows that the revolver had been transported in interstate commerce in order for it to reach Kentucky.

In *United States* v. *McCreary*, 455 F.2d 647 (6th Cir. 1972), the defendant was charged with

possession, but not with receipt, as in the case at bar. This Court noted that while the offense of receiving may have an aspect broader than the offense of possessing, the offense of possession always implies a receipt. In subsequent cases charging both possession and receipt, this Court has stated that a showing that the gun once moved in interstate commerce established a nexus for possession as well as for receipt. *United States* v. *Fields*, 500 F.2d 69 (6th Cir. 1974); *United States* v. *Bush*, 500 F.2d 19 (6th Cir. 1974); *United States* v. *Day*, 476 F.2d 562, 569 (6th Cir. 1973); *United States* v. *Brown*, 472 F.2d 1181 (6th Cir. 1973).

Because a person possessing a firearm must necessarily have received it, the course of conduct which Congress intended to punish is the same regardless of whether the facts charged or proven show a receipt of a possession. There is no logic in the position that a nexus sufficient to support a conviction for receipt of a firearm will not also support a conviction for possession after receipt.[3]

3. This is made clear by the recent decision of the Supreme Court in *Barrett* v. *United States*, ____ U.S. ____ (No. 74-5566, decided Jan. 13, 1976, 44 U.S.L.W. 4050), affirming our opinion reported at 504 F.2d 629 (6th Cir. 1974). *Barrett* involved a prosecution under the Gun Control Act of 1968, 18 U.S.C. §922(h), making it unlawful for a convicted felon to "receive" a firearm shipped in interstate commerce. The Supreme Court held it to apply to an intrastate receipt of such a firearm. The Supreme Court explained language in its opinion in *Tot* v. *United States*, 319 U.S. 364, 466 (1943), and dicta in *United States* v. *Bass*, 404 U.S. 336, 343 n.10 (1971).

In this case the Government proved the facts alleged in count 1 surrounding the purchase of the weapon by Jones. The Government could have charged receipt, but instead, it charged possession; the proofs would have supported a conviction under either charge. Because the commerce nexus is jurisdictional, and because the Government clearly had the power to punish this conduct as "receiving a firearm," it follows that the power to punish this same conduct is not diminished by labeling the conduct "possessing" rather than "receiving".

We hold that when a person is charged with possession of a firearm but not with receipt of it, proof that the firearm was manufactured outside the state in which the possession occurred is sufficient to support a finding that the possession was in or affected commerce.

IV

DENIAL OF BAIL

After his conviction Jones was sentenced to the maximum terms of imprisonment under 18 U.S.C. § 4208(b), which provides that custody under that statute will be for the purpose of study to determine a proper sentence for the prisoner. The District Court ordered that Jones be sent to a medical center for federal prisoners to determine his fitness to serve a term of imprisonment. Jones immediately filed a

notice of appeal from his conviction and an application for bail pending appeal, which application was denied by the District Court for the reason that he had been sent to the medical facility under § 4208 (b) for study. He then applied to this Court for bail pending appeal, which was denied. He was then taken to the medical facility and examined. After his return from the medical facility the District Court suspended the prison sentences and placed him on probation.

Under the circumstances we do not believe that this appeal presents a proper situation for us to ignore the mootness of this issue in order to rule prospectively upon the merits of Jones' contention that the denial of bail was predicated upon a reason not authorized by 18 U.S.C. §§ 3146 and 3148.

V

CRITERIA FOR SETTING SENTENCE

In passing sentence upon Jones the District Court stated:

> Mr. Jones, you have conducted illegal activities in the mountains of Eastern Kentucky for a long time. Notwithstanding the provisions of the Kentucky statutes, the authorities have seen fit on — out of your 37 convictions where a fine was paid, most of these were a violation of Kentucky laws against the possession of

> alcoholic beverages for resale in a local option territory. No public official has ever seen fit to use the third offense, an habitual offender statute against you to make these crimes a felony.
>
> . . . .
>
> It is the intent, Mr. Jones, of this Court to get you out of the whiskey business in the mountains.

The Court then imposed the maximum penalty on each count, but suspended two of the fines and all of the prison terms in view of Jones' poor health, placing Jones on probation for five years. It was the clear intent of the District Court to place a penalty of a long-term prison sentence and a $20,000 fine upon Jones if he were ever again caught possessing liquor with intent to sell in local option territory.

It is noteworthy that this offense is sufficiently petty in Kentucky that Jones has been fined $100 on thirty-seven occasions for violation of the statute, and that Kentucky officials apparently have considered Jones' conduct sufficiently innocuous that the Kentucky recidivist provision in that statute has never been invoked against him.[4]

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4. Kentucky Rev. Stat. 242.990 provides that a first offender of local option laws will be fined a maximum of $100 and/or sentenced to not more than 30 days in jail; a second offender faces a maximum penalty of $200 and 120 days in jail; a third or subsequent offender faces not less than one year nor more than two years in jail.

Jones argues that the District Court is improperly using a federal statute to enforce a state statute which it normally has no jurisdiction to enforce, and that the Court has thus created its own recidivist statute, in abrogation of the apparent decision of the state of Kentucky not to use its recidivist provision against him. It is also noteworthy that the state of Kentucky has never seen fit to punish Jones to the full extent of the law as a first offender.

While it would have been preferable for the District Court to inform Jones at sentencing that the purpose of the sentence was to deter him from possessing a weapon rather than to deter him from selling whiskey, we can find no reversible error in the sentence or in the criteria used by the District Court in imposing the sentence. Although the discretion of a trial judge to fix a sentence within statutory limits is no longer absolute, his exercise of sentencing discretion will be set aside only for gross abuse. *United States* v. *Latimer*, 415 F.2d 1288, 1290 (6th Cir. 1969). A sentencing judge may properly consider prior state law violations which may show a propensity to violate the law, or which may show that the defendant does not respond to certain types of punishment. It is clear that $100 fines do not deter Jones.

In view of the fact that a probationer normally faces revocation of his probation if he commits a criminal act, the Court had a duty to warn Jones

that violations of local option laws would place him in jeopardy of serving his jail term for this conviction. Jones is not prejudiced in any way by being required to obey state laws for five years in order to avoid serving his prison sentence.

We find no evidence that the District Court was biased against the defendant; consideration of prior criminal activity in fixing a sentence is not evidence of bias.

The conviction and sentence upon count 1 of the indictment is affirmed. The convictions and sentences upon counts 3 and 5 of the indictment are reversed.

* * * * * * *

Filed May 7, 1976
John P. Hehman, Clerk

No. 75-1817
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee

vs.

AGNEL JONES, Defendant-Appellant

ORDER

Before PHILLIPS, Chief Judge, WEICK and ENGEL, Circuit Judges.

No active Judge of this Court having requested that a vote be taken on the suggestion that the petition for rehearing be heard en banc, said petition for rehearing was considered by the panel.

It is now contended by appellant that under the "Fruit of the Poison Tree Doctrine", enunciated in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920), the convictions on all counts of the indictment were invalid. We have examined again the brief in chief and the reply brief of appellant and nowhere therein does he mention this doctrine or cite

the Silverthrone case, and we conclude that resort to it in the petition for rehearing was merely an afterthought.

In our opinion this doctrine is inapposite. In his motion to suppress, Jones did question the validity of the searches and seizures in March and December, 1973 and we thought that we had dealt adequately with them in our opinion.

The March search resulted from a routine traffic check for drivers' licenses, conducted by Kentucky State Police on Kentucky Route 7 at Estill, Kentucky. Jones was in the line of public traffic passing the check point. Trooper Williamson saw, in plain view, a revolver laying on the seat beside Jones. Williamson knew Jones and believed that Jones was a convicted felon despite an incorrect report which he later received. At the officer's request Jones handed the gun to him, and he noted the serial number thereon. He believed that Jones was engaged in the commission of a crime.

The December search and seizure was conducted by Federal Special Agents of the ATF Unit, who went to search Jones' store for illicit whiskey pursuant to the authority of a search warrant. One of the agents had previously worked as an undercover agent and saw Jones carrying a gun in a holster. Upon entering the store and announcing their identification and purpose, the agents

conducted a pat-down search on the person of Jones, but found no weapon. Special Agent Beam asked Jones whether he was carrying a gun and Jones replied that the only gun in the store was laying on the shelf. Jones then proceeded to the shelf, procured the gun and handed it to Beam. During his previous undercover investigation Beam had learned that Jones was a convicted felon. Beam unloaded the gun and recorded the identification data from it.

In our opinion, if there was any question about the March search and seizure the December search, conducted under the authority of the search warrant, was valid and the ATF Agents were entitled to use the fruits of that search to obtain the evidence upon which Jones was convicted on Count I.

The findings of fact adopted by the District Judge in connection with the December search are supported by substantial evidence and are not clearly erroneous.

We believe our opinion dealt adequately with the other issues raised by Jones in his petition for rehearing and they are without merit. We note Jones' disagreement with the decision of the Supreme Court in *Barrett* v. *United States,* _____ U.S. _____ (No. 74-5566, decided Jan. 13, 1976, 44 U.S.L.W. 4050). This decision is binding upon us.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT.

John P. Hehman

Clerk

* * * * * * *